INDEX

CITATIONS

	Page
Danziger v. *United States*, 161 F. 2d 299	12
Lutwak v. *United States*, 344 U.S. 604	5
Offutt v. *United States*, 348 U.S. 11	5
Russell v. *United States*, 369 U.S. 749	9
United States v. *Alo*, 439 F. 2d 751, certiorari denied, 404 U.S. 850	8
United States v. *Carson*, 464 F. 2d 424, certiorari denied, 409 U.S. 949	10
United States v. *Dellinger*, 472 F. 2d 340	5
United States v. *Fistel*, 460 F. 2d 157	7
United States v. *Granello*, 365 F. 2d 990, certiorari denied, 386 U.S. 1019	10, 11
United States v. *Gullia*, 304 F. Supp. 30	11
United States v. *Honesty*, 459 F. 2d 1279	11
United States v. *Leach*, 429 F. 2d 956, certiorari denied, 402 U.S. 986	10
United States v. *Nazzaro*, 472 F. 2d 302	5
United States v. *Roselli*, 432 F. 2d 879	11
United States v. *Sweig*, 441 F. 2d 114, certiorari denied, 403 U.S. 932	10
United States v. *Thompson*, 356 F. 2d 216, certiorari denied, 384 U.S. 964	8
Van Liew v. *United States*, 321 F. 2d 664	9
Wong Tai v. *United States*, 273 U.S. 77	9

Statutes and rules:

18 U.S.C. 2	2
18 U.S.C. 1001	2
18 U.S.C. 1031	2
18 U.S.C. 1341	2
18 U.S.C. 1503	2,8
Federal Rules of Criminal Procedure:	
Rule 8(a)	10
Rule 8(b)	10

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1736

LEON WEISS, ETHEL WEISS, MELCO INTERNATIONAL, LTD., AND MELCO INTERNATIONAL, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

All petitioners contend that they were denied a fair trial by the conduct of the trial judge; petitioners Leon and Ethel Weiss contend that the obstruction of justice count in their indictment was not sufficiently specific to assure that they were tried for the same offenses considered by the grand jury; petitioner Ethel Weiss contends that the district court committed reversible error in denying her motion for severance; and the corporate petitioners contend that they were denied effective assistance of counsel and that the court of appeals erred in remanding for a determination of whether the court had *in personam* jurisdiction over them.

After a jury trial in the United States District Court for the Southern District of New York, petitioners Leon Weiss, Melco International, Inc., and its wholly-owned subsidiary Melco International, Ltd., were convicted of (1) conspiracy to violate 18 U.S.C. 1001 and 1031 by causing false invoices and documents to be submitted to the Army and Air Force Exchange of the Department of Defense (hereinafter "Exchange") (Count 1); (2) causing invoices containing false statements to be submitted to an agency of the Exchange, in violation of 18 U.S.C. 1001 and 2 (Counts 2-17); and (3) mail fraud in furtherance of the scheme, in violation of 18 U.S.C. 1341 (renumbered Count 18). Petitioners Leon and Ethel Weiss were also convicted of corruptly endeavoring to obstruct justice by failing to produce documents subpoenaed by the grand jury, in violation of 18 U.S.C. 1503 (renumbered Count 19). Leon Weiss was sentenced to nineteen concurrent terms of 18 months' imprisonment and fined a total of $176,000. Ethel Weiss was sentenced to one year's imprisonment and fined $5,000, but her prison sentence was suspended and she was placed on probation for one year. Melco International, Ltd., and Melco International, Inc., were each fined $11,000. The court of appeals affirmed the convictions of Leon and Ethel Weiss. As to the corporate defendants, the court rejected their contentions on the merits, but remanded the case to the district court with directions to hold a hearing as to whether the court had jurisdiction over them (Pet. App. A, p. 19a).

The evidence is set forth fully in the opinion of the court of appeals (Pet. App. A, pp. 3a-6a). Briefly, the record reveals a scheme engineered by Leon Weiss to defraud the Army and Air Force Exchange of thousands of dollars upon the termination of a concession agreement with the

Vietnam Regional Exchange by inflating the actual costs incurred in connection with performance of the contract, thus falsely increasing the amounts to which the corporations controlled by petitioner[1] would be entitled by way of settlement.

Ethel Weiss became involved in the scheme after the grand jury began an investigation into Weiss's activities and issued a subpoena to Leon Weiss ordering the production of invoices and records relating to the settlement of the Vietnam Exchange contract. Thereupon, Mrs. Weiss, after discussing the matter with her husband, made a secret trip from New York to Hong Kong, where she obtained the incriminating invoices showing the actual prices paid in the performance of the contract. She took these documents to Switzerland, and, except for a copy of one such invoice apparently furnished by mistake, they were never given to the grand jury. Shortly thereafter, Leon Weiss denied to the district court that he made any effort to obtain the documents from Hong Kong.

1. Petitioners' contention that they were denied a fair trial by the conduct of the trial judge was thoroughly explored and properly rejected in the opinion of the court of appeals, on which we rely. The court stated (Pet. App. A, pp. 15a-18a):

---

[1]The proof at trial showed that from 1966 through 1969, Leon Weiss was the president and controlling stockholder of Melco International, Inc., a Liberian corporation which represented various manufacturers on a commission basis in sales to the Military Post Exchange Services in the Far East. Early in this period, Melco International, Ltd., a wholly-owned subsidiary of Melco International, Inc., was incorporated in Hong Kong to handle goods of non-American manufacture. During this time Weiss operated his various enterprises from New York, where he resided and maintained offices (T. 53-55, 128, 247-248, 322, 451, 484-487; Government Exhibit 61) ("T." refers to the trial transcript).

Many of the trial judge's comments, characterizations, and castigations of counsel would have been better left unexpressed, since they not only failed to serve any useful purpose but raised serious doubts as to the court's impartiality and judicial detachment. However, our detailed review of the record satisfies us that appellants' contentions, except for one asserted on behalf of the corporate defendants (discussed below), are grossly exaggerated. The excerpts quoted seriatim in appellants' briefs, while indicating a possible attitude of partisanship, are not truly representative of the judge's trial conduct and hence convey a distorted impression of the trial. The overwhelming bulk of the trial transcript reveals normal temperate conduct on the part of counsel and judge, with the latter limiting himself to categorical rulings on counsel's objections. As for the balance, many of the court's unfortunate comments quoted by appellants occurred outside of the jury's presence and hence could not have influenced the jury. Others were clearly provoked by defense counsel's unnecessary comments or statements in connection with their voicing of objections or by their pressing objections or arguments that were frivolous, repetitious, or in disregard of the court's earlier rulings. When defense counsel repeatedly and persistently attempts to introduce irrelevant evidence (*e.g.*, in this case proof of merchandise expenses designed to show that no *overall* profit was realized) he must expect that once the trial judge has made his basic ruling successive objections by the government will undoubtedly be sustained. Nor is it surprising that such wasteful tactics will lead a trial judge, during the heat of a nine-day trial, sometimes to become impatient. Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation.

Whatever display of impatience or irritation was exhibited by the trial judge toward defense counsel, the record further reveals that, while the judge from time to time took defense counsel to task, he did not hesitate likewise to express disapproval of some of the prosecutor's tactics and to sustain numerous defense objections. On the whole, therefore, the trial judge, while openly displaying displeasure on some occasions, was relatively even-handed. We cannot conclude from our thorough examination of the transcript that he displayed partisanship amounting to prejudicial error, or that his heated outbursts were "pervasive," see *Offutt* v. *United States*, 348 U.S. 11, 17 (1954). In the few instances where he questioned witnesses his queries appear to have been for the purpose of clarifying the record and not "designed to inject doubt or uncertainty as to the credibility of witnesses," see *United States* v. *Nazzaro, supra* [472 F. 2d 302]. As we have often reminded parties "[a] defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). While many of the judge's comments were improper, they did not singly or cumulatively approach the level of such harshness or contempt for the defense as to amount to denial of a fair trial. See *United States* v. *Dellinger, supra* [472 F. 2d 340]. [2]

The trial court's treatment of counsel for the corporate defendants, on the other hand, stands on a different footing. Approximately one month prior to trial Judge MacMahon assigned William S. Hack, who

---

[2] We also note the court's instruction to the jury that they were not to conclude from any rulings, questions, or remarks that he had any opinion as to the defendants' guilt or innocence (T. 1194).

had acted as attorney for the corporate defendants in certain matters, to defend them in this criminal case. Thereupon Mr. Hack wrote a letter to the court declining the appointment on the ground that he lacked trial competence. He had never participated in a criminal trial in his life; in fact his only participation in any jury trial had been his representation, some 15 years earlier, of a low-income tenant in a dispute with his landlord. Notwithstanding Hack's lack of qualifications to represent the corporate defendants at trial the judge, refusing to listen to or to accept Hack's protestations of incompetency, ordered him to represent them at trial, threatening in an open courtroom clash before trial to hold Hack in contempt and to report him to the Association of the Bar if he did not do so. Hack finally acceded after the judge at first refused to permit him to retain an experienced criminal trial lawyer to advise and assist him but later allowed the attorney to sit with him during the trial.

The conduct of the trial judge, including his excoriation of Hack, displays of temper and threats of contempt, was wholly unjustified. Admission to the district court bar of a lawyer who has never before tried a criminal case does not *ipso facto* qualify him to act as defense counsel in a complicated conspiracy trial. The proper procedure, if the corporate defendants persisted in refusing to appear by retained counsel, was to appoint a lawyer qualified to serve. Indeed, appointment of the attorney whom Hack sought to retain as his adviser would have been preferable to the course taken by the court.

Despite the impropriety in forcing Hack to serve against his will, the corporate defendants did not suffer prejudice requiring a new trial of the charges

against them. Although they might have chosen to defend on the theory that Weiss, McElroy and Moore [overseas employees of the corporations] had acted *ultra vires* or beyond their authority in representing the corporations which were the subject of the indictment, such a frivolous defense would have been doomed to inevitable failure, in view of Weiss' position as controlling stockholder, president and managing agent of Melco, and the overwhelming proof of his authority and that of McElroy and Moore. In all other respects the interests of the corporations were identical with those of Weiss, who was competently and vigorously defended by able trial counsel. Any and all steps that would have been taken on their behalf by their own counsel were taken by Weiss' attorney with the same force and effect. Furthermore, Mr. Hack, while lacking any criminal trial experience and remaining mute through most of the trial, did voice essential motions on behalf of the clients to whom he was placed in bondage by the court. He briefly summed up to the jury and acted with the advice of an attorney experienced in criminal defense practice. Under the circumstances, particularly the fact that the corporate defendants gained the full benefit of Weiss' defense, we cannot say that they were denied a fair trial.

2. Petitioners Leon and Ethel Weiss argue that there is no assurance that they were tried on the charges deliberated upon by the grand jury because the indictment did not specify the exact conduct by which they corruptly failed to produce the evidence subpoenaed by the grand jury. This contention was raised for the first time in the court of appeals; since the objection to the indictment was not timely raised it should not be considered by this Court. *United States* v. *Fistel*, 460 F. 2d 157,

161 (C. A. 2); *United States* v. *Thompson*, 356 F. 2d 216, 226 (C.A. 2), certiorari denied, 384 U.S. 964. In any event, the point is without merit.

The indictment (renumbered Count 19, Appendix in the Court of Appeals, pp. 18-19) charged that:

> From on or about March 5, 1971, up to and including the date of the filing of this indictment, * * * LEON WEISS and ETHEL WEISS * * * knowingly did corruptly endeavor to obstruct * * * the due administration of justice by failing to produce documents * * * which * * * had been subpoenaed by a Federal Grand Jury * * * [investigating the fraud charged in the previous counts of the indictment].

In a pre-trial demand for a Bill of Particulars, petitioners requested and received a list of the documents which were not produced (*id.* at 20); they did not ask for details as to the manner in which they "endeavored to obstruct" (Pet. App. A, p. 11a). At trial, petitioners moved to dismiss count 19 on the grounds that the mere failure to produce subpoenaed documents did not constitute a crime under 18 U.S.C. 1503 and that the indictment did not charge specific conduct by which they failed to produce the documents. As a result of this motion, the trial court instructed the jury that proof of some corrupt act such as suppression or concealment was necessary for conviction and that mere failure to produce was not sufficient (Pet. 17-18). The evidence clearly established such corrupt conduct, although it is not clear that such a finding was necessary under Section 1503. Cf. *United States* v. *Alo*, 439 F. 2d 751, 754 (C.A. 2), certiorari denied, 404 U.S. 850.

Petitioners do not claim the indictment was insufficient to apprise them of the nature of the charges or to protect them from possible double jeopardy, but only that it was not precise enough to assure them that they were tried on the same charge deliberated upon by the grand jury. On the facts of this case the argument is specious. The indictment adequately informed petitioners of the specific offense with which they were charged. *Russell* v. *United States*, 369 U.S. 749; *Wong Tai* v. *United States*, 273 U.S. 77, 81. The fact that petitioners did not seek in their bill of particulars any details as to the nature of the corrupt endeavor clearly demonstrates that they knew what conduct was being charged by the grand jury.[3]

3. Petitioner Ethel Weiss contends that the trial court committed reversible error in denying her motion for severance. Here again we rely on the opinion of the court of appeals (Pet. App. A, pp. 12a-13a):

> The key question is whether Mrs. Weiss participated in the "same series of acts or transactions constituting an offense or offenses." She contends that

---

[3] *Van Liew* v. *United States*, 321 F. 2d 664 (C.A. 5), cited by petitioners (Pet. 30-31), is inapposite. In that case the defendants had been charged in an omnibus indictment merely citing various statutes; four counts of the indictment encompassed eleven possible separate crimes and two other counts encompassed six possible different crimes. The court held that the indictment did not specify the crimes for which the defendants had been indicted. *Id.* at 671, 673. In the instant case, only one crime was charged in the count at issue, namely the corrupt failure to produce documents which had been subpoenaed. It was not necessary for the indictment to spell out all the evidentiary details, that is, whether the corrupt endeavor was made by destruction, concealment, or alteration of the documents; such information could have been discovered by a bill of particulars. *Id.* at 670.

since she did not play any part at all in the underlying scheme to defraud, which formed the basis of the first 18 counts against the other defendants, and since the conduct upon which the obstruction of justice charge against her [was based] did not take place until two years after the completion of that scheme, she cannot be said to have participated in the same series of acts or transactions constituting an offense or offenses. See *United States* v. *Granello*, 365 F. 2d 990, 993-94 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967); *United States* v. *Leach*, 429 F. 2d 956, 960 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971). The government, on the other hand, argues that since the purpose of the alleged obstruction of justice was to prevent it from adducing proof of the underlying scheme the situation is analogous to cases holding that charges of attempted concealment or cover-up of a crime are sufficiently connected with the crime itself to permit joinder. See *United States* v. *Carson*, 464 F. 2d 424, 436 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States* v. *Sweig*, 441 F. 2d 114, 118-19 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

While joinder of two or more offenses against the same defendant have been permitted pursuant to Rule 8(a), Fed. R. Crim. P., in the decisions cited by the government, this hardly supports joinder of different defendants upon separate charges under Rule 8(b), which is more restrictive. See *United States* v. *Granello, supra*, pp. 993-94. However, we need not decide this difficult question in the present case since, even assuming Mrs. Weiss was improperly joined, she has failed to show any prejudice to herself as a result of the joinder. If Count 19 had been tried separately, the government would have been allowed to introduce most if not

> all of the proof [of] the underlying fraudulent scheme in order to establish her motive, as Weiss' wife, to play a major part in obstructing the government's investigation into that scheme by removing material proof of her husband's participation in it. See *United States* v. *Granello, supra,* p. 995; *United States* v. *Roselli,* 432 F. 2d 879, 901 (9th Cir. 1970). Lastly Mrs. Weiss was further protected against "spillover" prejudice by the court's instructions to the jury, repeated on four occasions, that it must consider each charge against each defendant separately on the basis solely of the evidence introduced with respect to the defendant on that count. That the jury followed this instruction is evidenced by its specific request for a rereading of the court's charge relating to Mrs. Weiss.

While agreeing with the court below that Ethel Weiss failed to demonstrate any prejudice from the joint trial, we also submit that, in the circumstances of this case the joinder was proper. See *United States* v. *Gullia,* 304 F. Supp. 30 (W.D. Pa.). Cf. *United States* v. *Honesty,* 459 F. 2d 1279, 1282, n. 4 (C.A. D.C.). In the cases cited by petitioner (Pet. 33), certain defendants were held to have been improperly joined because the offenses charged were unconnected or unrelated to the charges against the main defendants. In the instant case, the obstruction of justice charge grew out of and was intimately connected with the fraud charges.

4. Melco International, Inc., and Melco International, Ltd., contend that they were denied effective assistance of counsel. We have already quoted the relevant portion of the opinion of the court of appeals in which that submission was rejected, *supra,* pp. 6-7. We add only that, in view of the claim of the corporations at trial that they were not within the jurisdiction of the court,

Mr. Hack's abstention from participation in most of the trial may well have been the result of defense strategy.

5. Finally, the corporate defendants contend that the court of appeals erred in remanding for a jurisdictional hearing. The court found that the jurisdictional issue could not be determined without a hearing, which had been requested by counsel for both sides prior to trial. Accordingly, a remand was ordered (Pet. App. A, p. 19a). This was entirely proper: the district court, by refusing the request for a hearing, deprived the government of the opportunity to prove jurisdiction.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

---

[4] *Danziger* v. *United States*, 161 F. 2d 299 (C.A. 9), cited by petitioners (Pet. 39), is inapposite. In that case, apparently the government did not offer to present evidence on the jurisdictional question.

DOJ-1974-09